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IN THE SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

W. D. MANLEY, APPELLANT, V. THE STATE OF GEORGIA, APPELLEE.	No. 429 From the Supreme Court of the State of Georgia.

BRIEF FOR APPELLANT.

Statement of Case.

This case involves the constitutionality of a statute of the State of Georgia. It arises as follows:

Manley was indicted on the charge of violating the *28th Section of Article 20 of the Banking Act of 1919 of the State of Georgia.* (*Georgia Laws 1919, p. 219*). As this is the statute which is attacked as unconstitutional it is quoted as follows:

> "Every insolvency of a bank shall be deemed fraudulent, and the president and directors shall be severally punished by imprisonment and labor in the penitentiary for not less than one (1) year nor longer than ten (10) years; provided, that the defendant in a case arising under this section, may repel the presumption of fraud by showing that the affairs of the bank have been fairly and legally administered, and generally, with the same care and diligence that agents receiving a commission for their services are required and bound

by law to observe; and upon such showing the jury shall acquit the prisoner."

The indictment merely charges in general terms that Manley was President and director of the bank and that the bank did fraudulently become insolvent, no specification or detail being given in the indictment. (R., p. 9).

To this indictment the defendant interposed a demurrer, whereby he raised the contention that the statute was repugnant to the 14th Amendment of the Constitution of the United States. (R., p. 11). This demurrer was overruled by the trial court. (R., p. 15). The case proceeded to trial, resulting in a verdict of guilty, and a sentence of from nine to ten years penal service. (R., p. 17).

The case was carried to the Supreme Court of Georgia and the constitutional question raised by the demurrer duly presented to that court and passed on by that court, and the judgment of the trial court affirmed. (R., p. 21). The Supreme Court of Georgia, however, divided on the question of whether the statute in question was repugnant to the 14th Amendment of the Federal Constitution. The majority opinion, concurred in by four Justices, is shown in the printed record, commencing at page 36. Justices Atkinson and Hill delivered a dissenting opinion, shown in the printed record, commencing at page 41.

The case is here on appeal, since it drew in question the validity of a statute of the State of Georgia as repugnant to the Federal Constitution and the decision was in favor of the validity of the statute. As the constitutional question arises wholly on demurrer and was treated by the Supreme Court of Georgia as adequately presented by the demurrer, it was not deemed necessary to encumber the record before this court by including the evidence presented before the jury, it being obvious that if the statute on which the defendant was convicted is, as asserted by the demurrer

and as thought by two Justices of the Supreme Court of Georgia, void because in conflict with the Federal Constitution, there can be no valid conviction.

Specification of Assigned Errors.

The assignment of errors relates to the action of the Supreme Court of Georgia in affirming the judgment of the trial court in overruling the defendant's demurrer wherein was raised the question of the constitutionality of the statute of the State of Georgia under which the appellant was convicted. The assignment also specifies the action of the Supreme Court of Georgia in affirming the judgment of the trial court convicting the appellant and sentencing him to penal servitude, for the reason that the error of the court in overruling the appellant's demurrer, wherein the constitutionality of the act was questioned, necessarily entered into and affected and vitiated the judgment of conviction. It is contended that the statute of the State of Georgia under which the conviction was had is repugnant to the 14th Amendment of the Federal Constitution and a denial of due process of law in three separate and definite respects, namely:

1. The Georgia statute is vague, indefinite and uncertain. It fixes no ascertainable standard of guilt, but leaves the same to be fixed by the variant views of different courts and juries which may be called upon to enforce the statute. "Men of common intelligence must necessarily guess at its meaning and differ as to its application."

2. The statute does not secure to persons accused thereunder reasonable information as to the nature and cause of the accusation against them.

3. The presumption raised by the statute from the mere fact of insolvency of the bank that such insolvency was pro-

duced by fraudulent and criminal conduct on the part of the particular officer or director under indictment is so arbitrary and unreasonable as to amount to a denial of due process of law.

These points will be considered separately.

(1)

The Statute Is so Vague and Indefinite as to Constitute a Denial of Due Process of Law.

In an effort to determine what is made criminal by this statute we must look beyond the mere presumptions provided by the statute and ascertain what is ultimately punished as criminal.

The statute begins by providing that every insolvency of a bank shall be deemed to be fraudulent and the president and directors sentenced to penal service. Of course the statute does not intend to punish mere insolvency not produced by misconduct on the part of the officers. Not only does the statute not attempt this, but we assume no one would contend that, whatever may be the rule as to civil liability, a state could condemn the officers of a bank as criminals for an insolvency of a bank for which they were in no way to blame. While this particular statute commences with a sweeping condemnation, this is followed by a proviso setting up a defense which is made available to the officers.

Therefore, to determine what is made criminal by this act we must look first to the proviso, since, upon it appearing that a bank had become insolvent, the judicial inquiry would be addressed primarily to whether the accused officer could bring himself within the terms of the proviso.

This is so notwithstanding the fact that the Supreme Court of Georgia has held (see *Griffin v. The State*, 142 *Ga.* 636) that the accused under this statute is not exclusively limited to the defense set out in the proviso but may repel the presumption of fraud by other means, since it nevertheless is clear, and is recognized by the Supreme Court of Georgia, that under this statute the accused may defend a case by showing that he is within the terms of the proviso. The proviso, therefore, is an integral and essential part of the description of a crime denounced by the statute, since, if the facts bring the case within the proviso, there has been no violation of this law.

The substance of the proviso is that a defendant shall be acquitted if he can show three things, namely: (1) that the affairs of the bank have been "fairly" administered; (2) that the affairs of the bank have been "legally" administered; and (3) that the affairs of the bank have been generally administered with the care required of agents for hire, which the Supreme Court of Georgia has defined as meaning "ordinary care". All three must be shown to come within the proviso. (See the opinion in this case, R., p. 40).

To summarize the effect of the foregoing analysis, this statute as a whole, insofar as it defines the crime which is to be punished, does so only by providing generally that fraudulent conduct of an officer of a bank producing its insolvency shall subject him to penal service unless he can bring himself within the terms of the proviso. This is the sum and substance of the construction of the statute as announced by the Supreme Court of Georgia in the *Griffin case, supra*, and in the case at bar.

The statute, both in its general condemnation of undefined fraudulent conduct producing insolvency and in the terms of the proviso, is so vague and indefinite as to constitute a denial of due process of law. The court is asked to bear in mind the complicated character of the business of a bank,

the fact that an ordinary jury is totally ignorant of the nature of banking transactions, the vast field for difference of opinion as to what constitutes "fair" conduct on the part of its officers, or even "fraudulent" conduct on the part of its officers, and perhaps above all the uncertainty and room for difference of opinion which is involved in the standard as to whether the affairs of the bank have been administered with "ordinary care." The statute simply delivers the defendant to the jury and, without prescribing any real standard for determining his guilt, directs the jury to fix a standard according to its own judgment as to the way in which he has handled the affairs of the bank. The liberty of the accused is made dependent upon whether twelve men, who may be, and usually are, totally ignorant of bank management, believe that he has borne the burden of showing that the affairs of the bank were managed fairly and with ordinary care. This judgment is to be based on the "hindsight" of twelve untrained men, and at a time when the minds of the public in the particular community are charged with the excitement and prejudice which will inevitably follow a bank failure whatever may be its cause.

We will analyze in more detail the essential vagueness of this statute. We will point out that it is specifically controlled by decisions of this court which have, on this constitutional ground, invalidated statutes less vague and uncertain. We have endeavored first to present a general picture of the nature and operation of the statute in this respect. It is on its face the most complete piece of legal machinery for oppression which any American legislature has yet devised. Its real meaning and effect is that wherever a bank fails the president and directors shall be sent to the penitentiary if it is the general sentiment of the community in which the failure occurs that this is the proper thing to do. And its operation in this respect cannot be adequately grasped if we lose sight of the fact, which is within the common experience of all of us, that whenever there is a large bank failure it invariably is the general

sentiment of the community that all of those in charge of the bank should be punished—a sentiment which arises without the slightest regard to the actual cause of the failure, and is usually coupled with a widespread inability really to understand the complicated economic factors which frequently enter into a situation of this kind.

As early as *United States v. Blaine*, 139 *U. S.* 306, this court announced the rule that "laws which create crime ought to be so explicit that all men subject to their penalties may know what act it is their duty to avoid."

A long line of cases has arisen, some involving federal legislation under the 5th Amendment, and some involving state legislation under the 14th Amendment, which have considered the denial of due process of law by statutes defining crime in terms so vague that the guilt or innocence of persons accused thereunder is settled by the idiosyncracies of those who constitute the courts and juries rather than by legal standards. A brief review of some of them will be helpful.

In *Collins v. Kentucky*, 234 *U. S.* 634, the court considered a Kentucky statute which made it criminal under certain circumstances to sell pooled tobacco, and made the test of the legality of the pool "whether it raised prices above the real value". The court held that this test of criminality was so vague as to deny due process of law and that the statute was void as violative of the 14th Amendment.

In *United States v. Pennsylvania Railroad Co.*, 242 *U. S.* 208, the court stated that an order of the Interstate Commerce Commission, the violation of which was made a crime, which required tank cars to be furnished "upon reasonable request and reasonable notice" was so indefinite as to be void. While this case did not consider the matter from a constitutional standpoint, it is cited as a controlling

authority by this court in the Cohen Grocery Company case next to be cited.

United States v. Cohen Grocery Co., 255 *U. S.* 81, is a case of great importance. It involved the food control act passed as a war time measure, and had back of the effort to sustain the act all the pressure of the patriotic desire of the nation to support its war time legislation. The act made it a crime "for any person wilfully to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries." The court held the "unjust or unreasonable" test so vague as to make the statute void as a denial of due process of law. The case arose under the 5th Amendment, as it involved congressional legislation. Of course, the same principle applies to state legislation under the 14th Amendment.

International Harvester Co. v. Kentucky, 234 *U. S.* 216, *and American Seeding Co. v. Kentucky*, 236 *U. S.* 660, both involved the same Kentucky statute where the "real value" test determined the criminality of conduct. In both cases it was held that the test was so vague as to render the statute void under the 14th Amendment.

Fox v. State of Washington, 236 *U. S.* 273, *refused to hold* violative of the 14th Amendment a statute of Washington which made it criminal to print any matter tending to encourage disrespect for law; but the court puts its refusal on the ground that the Washington Court had construed the statute as being limited to those publications which sought to induce an actual breach of criminal statutes. It is obvious that this limitation was thought by the court to be necessary in order to sustain the statute.

Connally v. General Construction Co., 269 *U. S.* 385, presents a general review of the cases from this court and a summary of their effect. The particular statute involved was a state law making it criminal for a contractor to pay

his employees "less than the current rate per diem in the locality where the work is performed." The statute was held to be so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, which, the court says, "violates the first essential of due process of law."

The particular importance of this decision is the basis of distinction which it points out between the line of cases cited by us and certain other decisions of this court which had been urged as expressing a contrary view. Such other cases, the court says, are to be distinguished upon the ground, either that "they employ words or phrases having a technical or other special meaning well enough known to enable those within their reach to correctly comprehend them" (the court giving as examples of this, *Hygrade Provision Co. v. Sherman*, 266 *U. S.* 497, and *Omaechevaria v. Idaho*, 246 *U. S.* 343), or they were cases considering words having "a well settled common law meaning." (Examples of this given by the court are *Nash v. United States*, 229 *U. S.* 373, and *International Harvester Co. v. Kentucky*, 234 *U. S.* 216.)

Cline v. Frink Dairy Co., 274 *U. S.* 445, considered a statute of Colorado prohibiting certain agreements and combinations in restraint of trade, with a proviso attached to the statute that such agreement should not be deemed unlawful where the basis and purpose of the agreement was to conduct operations "at a reasonable profit, or to market at a reasonable profit those products that cannot be otherwise marketed." The court held that without the proviso the statute would have been sufficiently definite, but that with the proviso as an integral part of the description of the acts made criminal the statute became so vague as to constitute a denial of due process of law. After stating the substance of the statute without the proviso the court says:

"The foregoing language sufficiently describes for

purposes of a criminal statute the acts which it intends to punish, but the Colorado law does not stop with that. It is accompanied by two provisos which materially affect its purport and effect."

The court then proceeds to point out why the provisos are so vague as to destroy the constitutionality of the statute. We point out this feature of the decision since, should it be held that the Georgia statute, without the proviso, was sufficiently definite, we cite this case as a controlling authority for the proposition that vagueness in a proviso creating an exception to a criminal statute, or a limitation thereon, is a fatal defect in the statute as a whole.

In *Cline v. Frink, supra*, the court then proceeds to point out that where the test of criminality under the proviso involved a standard of what was "reasonable" the standard was too vague to satisfy constitutional requirements. Such a standard is one as to which "men of common intelligence must necessarily guess as to its meaning and differ as to its application." It makes no difference that a standard of this kind is ample in civil cases. Criminal guilt requires a more definitely ascertainable rule. The court refers to the fact that it had held in a headnote per Curiam in *Miller v. Oregon*, 273 U. S. 657, that a statute punishing as manslaughter a homicide due to driving an automobile on a public highway in a careless and imprudent manner was sufficiently definite to furnish due process of law. The court points out, however, that such a standard for an automobile driver is one which would be understood by the average man and is not harsh or arbitrary. The standard of reasonable care, however, cannot be applied as a test of criminal liability to problems arising in complicated economic or business matters. The court uses language which in this respect is controlling on one feature of the case at bar which we quote as follows:

"But it will not do to hold an average man to the

peril of an indictment for the unwise exercise of his economic or business knowledge involving so many factors of varying effect that neither the person to decide in advance nor the jury to try him after the fact can safely and certainly judge the result." (Italics by us).

From the foregoing cases the principles to be applied are settled and easily stated. The standard applicable to criminal liability is not that to be applied in civil matters. It must be more definite. It must be one which will enable the average man to determine at the time he acts whether or not he is violating the law. It must not leave the ascertainment of guilt to the idiosyncracies and varying opinions of those who happen to compose the court and jury.

Specifically, such standards as "real value", "unjust or unreasonable rate", "current price", "reasonable profit", "reasonable notice" and reasonable care (except as applied to matters within the ordinary experience of men, such as driving an automobile, and specifically as distinguished from "reasonable care" in economic or business operations) are so vague as standards of guilt as to deny due process of law. Specifically also (see *Cline v. Frink, supra*), if the vagueness arises from a proviso to a general rule it permeates the whole statute and invalidates the whole statute, since no man can determine guilt under the statute without considering the proviso and thereby encountering the vague standard.

A simple application of these established rules to the statute under consideration shows that the cases cited are controlling and that this statute must be condemned.

Taking first the provision of the statute without the proviso, if it can be said to set even a verbal standard of guilt that standard would be fraudulent banking leading to insolvency. There is no effort whatever to define fraudulent banking or to throw any light on what is to be considered

as fraudulent banking in a prosecution under the statute. There was no such crime at common law as "fraudulent banking", or as "fraud". The term "fraud", of course, had a meaning at common law in civil matters, but so had the standard of reasonable care, which, as pointed out in *Cline v. Frink*, supra, when applied to the exercise of judgment as to economic or business conditions is too indefinite to be the basis of a criminal statute. When a statute delivers a defendant to a jury to determine whether in any respect he has been guilty of fraudulent banking in the complicated affairs necessarily incident to bank management and gives no information whatever as to what is meant by fraudulent banking, the final conclusion of a jury will necessarily be determined by the variant views of its members as to business policy and ethical obligations in business transactions rather than by any fixed and ascertainable legal standard. This is therefore exactly the kind of statute which is condemned by the cases cited.

When we come to the proviso we find the vagueness greatly increased. As pointed out, the defendant is not guilty if he can show three things: (a) that the bank was "fairly" administered; (b) that it was "legally" administered; and (c) that it was administered with ordinary care. All three must be shown. The second, as to legal administration is, of course, clear, but merely showing that no law was violated does not bring the defendant within the proviso unless he also shows that the bank has been administered fairly and with ordinary care. There is no way to escape the proposition that an integral element of the determination of guilt under the statute is whether the jury believes that the affairs of the bank have been administered fairly and with what they would consider ordinary care.

The Supreme Court of Georgia recognizes this in the present case. We quote from the majority opinion (R., p. 39).

"These terms are not uncertain and indefinite. The

affairs of a bank are fairly administered when honestly administered. A person of ordinary intelligence, intrusted with the management of the affairs of a bank, knows when he is fairly and honestly administering these affairs. * * * * * This presumption places upon these officers the burden of showing that they administered the affairs of the bank with the same care and diligence that agents receiving a commission for their services are required and bound by law to observe. * * * * * All these terms and requirements of the statute are plain and definite; and, when a defendant who is charged with a violation of this statute shows that he complied with these requirements, the jury is required to acquit him."

What the court says is that a criminal statute is sufficiently definite which makes the guilt of an accused person dependent on the decision of a jury as to whether complicated banking transactions have been managed "fairly" and with ordinary care. Surely no decision could be more directly in the teeth of the cases from this court which we have reviewed. It is certainly no answer to say, as the Supreme Court of Georgia says, that a person knows whether he is fairly administering the affairs of a bank. Does he know that the judgment of a jury, ignorant of banking management, and called "to try him after the fact," will be based on the same standard? The true rule is found in a statement quoted with approval by this court in *Connally v. General Construction Co., supra*:

> "Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another."

We quote also from *Cline v. Frink, supra*:

> "A legislature must fix the standard more simply and more definitely before a person must conform or a jury can act."

Taken as a whole, the statute does no more than submit to a jury the question of whether in their judgment the general management of the bank by its officers was such that on general principles the jury think the officers should be condemned to penal service.

This case presents in one important respect a perfect illustration of how under this statute the guilt or innocence of an accused will be made to depend on matters of opinion as to which honest and conscientious jurors may entertain entirely different views. Such difference of opinion relates, not to questions of fact, but to problems of policy, judgment, and business ethics, as to which no standard whatever is set by the statute itself. The illustration is found in this: The most serious criticism of the management of this particular bank which is indicated by the statement of facts prepared by the Supreme Court of Georgia is that just before its failure, and when it was rather in need of money, it loaned, without security, $80,000 in different loans to twenty-four other banks which were members of what the court speaks of as "the Manley chain". (R., p. 33). Just what is meant by a chain of banks is not defined by the court, but it indicates a number of allied banks with closely interlocking relations of mutual support and known to the public as parts of a connected chain. These loans were made without security. The borrowing banks, with one exception, failed; and a large part of the $80,000 was lost. The inference suggested is that Manley as President of the particular bank out of which this indictment grew was misusing its funds to help other banks in the same chain.

Now, as pointed out, this is plainly the most serious criticism of his management, since it occurred just before the failure of the bank. The various loans which are crit-

icised, other than the ones now under consideration, were either repaid before the failure of the bank, as shown by the statement of facts, or had been made a long time before its failure when its finances did not appear in such critical shape. It is fair to suppose, therefore, that if the jury went any farther than merely considering that the accused should be convicted on general principles because his bank failed, (enhanced by the fact that his chain had failed), they probably were more impressed by these loans to other banks of his chain, made at this critical time, than by anything else in the case. Certainly this may be true. Certainly the statute is such as to submit such question to the jury as a basis for a conviction, on the theory that he was not managing the bank fairly or with due care.

Now, were these loans to other members of the chain of banks fraudulent banking, or should the making of the loans be considered "fair" management of the particular bank? On the one hand it may be said that when the particular bank making the loans was pressed for money and the defendant knew his other banks were in danger of failure it was a gross injustice to this bank for such loans to be made. On the other hand many conscientious men in the position in which the accused then found himself would have taken an entirely different view, and would have felt that they could best save this bank from failure by saving the other banks in the same chain.

It is, of course, clear that if several members of a system of chain banks fail the whole chain is likely to be swept away. Students of banking differ as to the economic soundness of the idea of chain banking. It is said that it furnishes greater security to depositors because the stronger banks in the chain can help the weaker ones. It is certainly true, however, that the weak ones can imperil the strong ones, and the chain must stand or fail practically as a whole.

In making the loans the particular bank was not only helping the banks to which the loans were made, but it was protecting itself as well, because only by saving the chain could it save itself. If the defendant had taken the other course and had refused help to the other member banks, and their failure had precipitated the failure of the bank in question, he would, under the statute, have stood presumptively guilty of fraudulent banking. He had no way of knowing in advance of the verdict which course would be considered fair, and which course unfair, by the jury; and the presumption was against him no matter which course he took.

From the standpoint of the accused, it would have been to his own selfish interest not to make the loans; since, if he could save any of his banks, he would save something for himself. But most conscientious men in his position would feel that for the stronger banks in the chain to help the weaker ones, so far from constituting fraudulent banking, is in reality a duty resting upon such stronger banks and upon those in charge of their management.

We do not undertake to say which of these views is the sound view. The point is this: That a banker, faced with this problem, must make a decision which either way it is made will be thought by some to have been wrong and to have constituted unfair management of the bank or banks; and as to this the statute furnishes no standard or criterion whatsoever.

(2)

The Statute Denies Due Process of Law in That It Furnishes the Accused No Information as to the Nature and Cause of the Accusation Against Him.

An indictment found on this statute need give no infor-

mation as to claimed misconduct on the part of the defendant, since "it does not devolve upon the prosecution to allege, nor to prove in the first instance, any more than the fact that the bank became insolvent while under the management and control of the accused."

Snead v. The State, 165 *Ga.* 44.

In *United States v. Cohen Grocery Co., supra*, the court pointed out that a vague criminal statute of this kind is defective, among other reasons, because it fails to carry information to the accused of the nature of the accusation against him based on the statute. It was discussed in that case in its relation to the 6th Amendment to the Federal Constitution, but the 14th Amendment, as applied to State legislation, necessarily requires that a person accused of crime be given reasonable notice of the nature of the accusation against him. Indeed, notice and an opportunity to be heard are the most fundamental rights guaranteed as due process of law. The court looks to the substance and not to the details of procedure and inquires whether the accused has really been given proper information as to the charge against him.

> "The essential elements of due process of law are notice and an opportunity to defend. In determining whether such rights are denied we are governed by the substance of things, not by the mere form."
>
> *Simon v. Croft*, 182 *U. S.* 427.
> *Louisville & Nashville Railroad Co. v. Schmidt*, 177 *U. S.* 230.

Does an indictment framed under this statute, alleging merely that the bank became insolvent while the accused was one of the persons charged with its management, carry any real information to him as to the charges on which he is actually to be tried? It goes through the form of stating

a charge against him; but disregarding mere form and looking to substance, does it really carry the minimum of information which an accused must have in order to be given a reasonable opportunity to defend?

Consider the situation of such an accused. The prosecution need charge and prove only that the bank has become insolvent while he was president or a director. He then assumes the burden of showing that at all times, at least within the last four years which are provided by the statute of limitations,[1] the bank has been fairly administered,[2] no laws have been violated,[3] and it has been managed with ordinary care. He may, under the Supreme Court decision, undertake to defend in another way by exculpating himself from any fraudulent conduct contributing to the failure of the bank. As in the nature of things it would be impossible for him to take up each particular transaction which the bank had conducted within the past four years, he must make this proof in general terms, if at all. Thereupon the prosecution may repel the proof offered by the accused *by attacking any transactions which it elects to criticize which have occurred in the last four years, and if any one of the transactions is shown to be either unfair or contrary to law, or managed without ordinary care, or involving fraudulent conduct on the part of the accused, then the accused has failed to sustain his defense under the statute.*

As to which transactions the prosecution will criticize the accused has no information whatever, and as to any one of them which the prosecution elects to criticize the accused is presumed to be guilty until he shows the contrary. The impossibility of being prepared to defend every single transaction occurring in four years of banking operations is too manifest to require comment; yet this is exactly what is necessary to be ready to defend an indictment under this statute. Such an indictment simply cannot be defended if there is a strong local sentiment against the accused.

Suppose an indictment had read that the accused was charged with a crime in that, at some time not named in the indictment, in some respect not named in the indictment, and in some transaction not named in the indictment, he had been guilty of fraudulent banking. We take it no one would contend that such an indictment carried to the accused sufficient information as to the nature and character of the charge against him as to supply the notice required as due process of law. An indictment, under the present statute, is exactly this in substance, except that the prosecution is not limited to any one transaction but may bring up any number of them which it desires, as to each of which the accused starts with the presumption against him and the jury is instructed to find him guilty unless he affirmatively shows the contrary.

Due process of law guarantees to an accused, in criminal cases, the right to be informed with clearness and certainty of the crime with which he stands charged together with every ingredient of which the offense is composed.

What such right includes has thus been stated by this Court:

> "It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species,—it must descend to particulars. 1 Arch. Cr. Pr. and Pl., 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may

decide whether they are sufficient in law to support a conviction if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances."

United States v. Cruikshank et al., 92 *U. S.* 542, 558. In *Rosen v. United States*, 161 *U. S.* 29, 40, this Court said:

"The doctrine to be deduced from the American cases is that the constitutional right of the defendant to be informed of the nature and cause of the accusation against him entitles him to insist, at the outset, by demurrer or by motion to quash, and, after verdict, by motion in arrest of judgment, that the indictment shall apprise him of the crime charged with such reasonable certainty that he can make his defense and protect himself after judgment against another prosecution for the same offense."

The doctrine here contended for has been thus stated:

"The accused must receive sufficient information to enable him to reasonably understand, not only the nature of the offense but the particular act or acts touching which he must be prepared with his proof; and when his liberty, and perhaps his life, are at stake, he is not to be left so scantily informed as to cause him to rest his defense upon the hypothesis that he is charged with a certain act or series of acts with the hazard of being surprised by proofs on the part of the prosecution of an entirely different act or series of acts."

United States v. Potter, 56 *Fed.* 83, *see p.* 89.

Since the Supreme Court of Georgia has held that an

indictment sufficiently meets the requirements of the statute when it alleges only that the bank became insolvent while the defendant was one of its designated officers (*Snead v. State*, 165 *Ga.* 44, and especially the 5th, 6th, 7th, 8th and 9th divisions of the opinion on pages 53, 54, and 55), it is necessary to attack the statute as being unconstitutional for such an uncertainty. We could not demur to an indictment where everything which the Supreme Court of Georgia has held is required to be alleged under the statute is alleged. In such a situation, if such notice is not sufficient the defect is in the statute itself. This is substantially the view taken by this court in *Cohen v. United States, supra.*

Let us look to the practical working of this statute as illustrated by the majority opinion in the case at bar. The majority opinion holds that certain evidence was erroneously admitted over the objection of the defendant which would ordinarily require the grant of a new trial. (R., p. 55 and 56.) The court then proceeds to hold that notwithstanding the illegal character of the trial a new trial will not be awarded because the evidence demanded the conviction of the accused. (We merely note in passing that in a later part of the opinion the court holds that the evidence would have authorized the acquittal of the defendant but did not demand the acquittal as a matter of law. R., p. 71, 72.) The court arrives at the conclusion that the evidence demanded conviction by saying first that the undisputed evidence showed that the bank was insolvent. The court then says that the burden was cast upon the defendant of showing that the affairs of the bank had been fairly and legally administered, and points out three respects in which it says the evidence required a finding that the statutory requirements as to banks had not been complied with. Since the evidence required a finding that *some* banking statutes had not been complied with the court concludes that the burden cast upon the defendant had not been borne and his conviction was required as a matter of law, and refuses to grant a

new trial even though holding that what would ordinarily be reversible error had been committed.

It is worth while to consider these violations of statutes pointed out by the court. It appeared that the defendant had overdrawn his account in a rather moderate amount without the authority of the board of directors and, as the court says, "without such authority the defendant committed a misdemeanor in making such overdrafts. 8 *Parks Code, Supp.* 1922, §2281 (*s*)." It also appeared that the bank had made loans to other banks, some of which were in excess of twenty per cent. of the capital and unimpaired surplus. Such loans, as the court points out, are prohibited by statute. There appears to be no statute making them criminal.

The court also points out that another statute prohibits the lending of more than ten per cent. of the capital of a bank to one borrower except upon good collateral, and that this statute was in some instances violated; a violation of which, however, appears not to be criminal. There is also one other respect in which the court says that it appears as a matter of law that the affairs of the bank were not fairly and legally administered.

It will thus be seen that the actual conviction of the defendant in this case is sustained because of a failure to comply with three statutes in certain matters which are not even hinted at in the indictment, and which at most would constitute only a misdemeanor, punishable under the Georgia law by not in excess of twelve months imprisonment, whereas the defendant was actually sentenced to from nine to ten years imprisonment. The indictment and the statute under which it was framed in no wise suggest to the defendant the possibility of his being charged with violating these statutes on which his conviction is finally sustained, any more than they suggest to him a charge of violating any of the other statutes of the state relative to

bank management, although it would have been competent for the state to prove a violation of any of them in any respect in the trial of the case.

Art. 20 of the Banking Act of 1919 deals with crimes and misdemeanors. (*Ga. Laws*, 1919, *p.* 212 *,et seq.*) It has thirty-eight sections which create twenty-six statutory crimes which may be committed by bank officers. In an indictment under the statute now before the court it would be competent for the state to prove a violation of any one of these twenty-six criminal statutes, most of which are misdemeanors, and upon proof of the violation of any such statute the defendant could be convicted under the statute on which the present indictment was found and sentenced to a maximum of ten years, without regard to whether his trial was legally conducted or not. This is the necessary effect of the decision in the present case.

This is, however, an understatement of the actual burden placed upon the defendant. The banking act is filled with statutory regulations of banks, the violation of which are not made crimes. If it appeared that any of these statutory regulations had been violated the defendant, as pointed out by the Supreme Court of Georgia in the case at bar, would be held not to have sustained the burden of showing that the affairs of the bank had been "fairly" administered. We have still understated the matter. Even though the defendant succeeds in showing that he did not violate any of the twenty-six criminal statutes in the banking act, or any of the statutory regulations as to banks in addition to the criminal statutes, he has not yet borne the burden. It is still open to the state to inquire whether, in any respect not governed by statute, it may satisfy the jury that the affairs of the bank were not administered fairly and with ordinary care.

Now the immediate point is that as to none of these matters on which he is actually tried does the statute under

which he is placed on trial, or the indictment conforming to the statute, give the defendant the slightest information. Under such an indictment it is competent for the state to show a violation of any criminal or civil requirements of the banking act or a failure in any respect not governed by statutes to administer the affairs of the bank fairly and with ordinary care, and to show this *at any time within the four years covered by the statute of limitations*. Probably this also is an understatement. What the statute punishes is fraudulent insolvency. If the insolvency occurs within the statute of limitations it is probable that the court would hold that violations of the banking act, failure to exercise care, etc., occurring prior to that time, could be proved against the defendant.

Further elaboration of all of this would be a mere waste of time. The sum and substance of the whole matter is that no information whatever is given to the defendant as to the matters on which he is really to be tried; that the actual operation of the statute places the defendant before a jury with a sweeping presumption of guilt against him and without that minimum of notice of the real nature of the accusation against him which is of the essence of due process of law.

(3)

The Presumption Created by the Statute Is So Arbitrary and Unreasonable as to Constitute a Denial of Due Process of Law.

The power of a state to regulate the procedure and rules of evidence in its courts does not go to the extent of authorizing it to create, by statute, an arbitrary presumption of guilt, even though the presumption is *prima facie* only. There must be some reasonable and logical connec-

tion between the thing proved and the thing which the statute presumes as an inference therefrom. If the inference is unreasonable and arbitrary, the defendant convicted thereby is denied due process of law. These principles are now fully settled.

Bailey v. Alabama, 219 *U. S.* 219.

Mobile, etc., Railroad v. Turnipseed, 219 *U. S.* 35.

McFarland v. American Sugar Refining Co., 241 *U. S.* 79.

Hawes v. State of Georgia, 258 *U. S.* 1.

Ferry v. Ramsey, 277, *U. S.* 88.

Casey v. United States, 276 *U. S.* 413.

The *Bailey Case* invalidated a statute of the State of Alabama because of a presumption created by the statute. The statute made it criminal to obtain money on a contract for labor and then to refuse to furnish the labor or to return the money so received where there had been a fraudulent intent not to fulfill the contract at the time the money was received. Up to this point the statute could not have been criticized. But the statute went further and provided that a *prima facie* and rebuttable presumption could (not must, as in the case at bar) be drawn by the jury from the receipt of money on such a contract and the failure to work, the presumption being that the person so receiving the money had fraudulently intended not to fulfill his contract at the time of its receipt. This presumption was held so unreasonable as to be beyond the power of the state.

The *McFarland case* held unreasonable and void a statute of the State of Louisiana because of a presumption embodied in that statute. The statute made criminal a monopoly or combination of persons engaged in the refining of sugar in the State and drew a presumption of guilt from

proof that the defendant systematically paid less for sugar in that State than he paid out of the State, and also drew a presumption of guilt from the closing or keeping idle of a sugar refinery for more than one year. The court held the presumption was so arbitrary as to be a denial of due process of law and that the invalidity of the presumption was fatal to the statute as a whole.

Ferry v. Ramsey dealt with a statute of Kansas creating a civil liability only against directors of a bank for knowingly permitting the bank to receive deposits when insolvent. The statute contained a presumption of knowledge of insolvency from proof that deposits were received when the bank was in a failing condition. As to this, this court divided six to three. Three Justices held the presumption unreasonable and the statute void. The majority held that it was unnecessary to consider the reasonableness of the presumption since, being merely a civil case, the State could have provided an absolute liability on the part of the bank's directors independently of their knowledge. A study of the case forces the conclusion that the majority also thought the presumption inherently unreasonable and sustained the statute only because it related to a civil liability which could have been made absolute without regard to the matter to which the presumption related.

Casey v. United States involved a decision in which this court divided five to four. The statute under consideration was the federal statute against purchasing narcotics from other than original stamped packages. The presumption sustained by the majority was a statutory presumption against one in whose possession narcotics in packages not bearing the required stamps are found. The majority held this presumption not arbitrary or unreasonable.

The other two cases cited sustained as reasonable statutory presumptions which also are entirely different from the one now before the court and require no special con-

sideration. All of the cases, however, recognize the fundamental rule that no unreasonable and arbitrary presumption of guilt created by legislative enactment can be sustained consistently with the 14th Amendment of the Federal Constitution.

The presumption now before the court is this: Upon proof that the defendant was either president or director of a bank and that such bank had become insolvent the statute provides that a presumption shall arise of fraudulent banking on the part of such president or director. So vital to the statute is the presumption that the statement of the crime is put in the form of a statement of the presumption, qualified later by the statement that it may be rebutted in certain ways, the language of the statute being: "Every insolvency of a bank shall be deemed fraudulent and the president and directors shall be severally punished," etc.

To define the question more clearly we inquire, first, what is meant by insolvency in this connection. This is answered by the statute itself. *Sec. 5 of Art* 1 of the Banking Act of 1919 (*Ga. Laws*, 1919, *p.* 138), defines the meaning of the term insolvency as used in that act:

> "A bank shall be deemed to be insolvent, first, when it cannot meet its liabilities as they become due in the regular course of business; second, when the actual cash market value of its assets is insufficient to pay its liabilities to depositors and other creditors; third, when its reserve shall fall under the amount herein required and it shall fail to make good such reserve within thirty (30) days after being required to do so by the Superintendent of Banks."

Prior to the adoption of the *Banking Act of* 1919, §204 *of the Penal Code* of the State of Georgia had been in the exact language of §28 *of Art.* 20 *of the Banking Act.* (This is

the statute on which the indictment in this case was founded, and the constitutionality of which is questioned.) The meaning of insolvency of a bank as used in *Penal Code* §204 had come before the Supreme Court of Georgia in *Griffin v. The State*, 142 *Ga.* 6[illegible]. Bear in mind that *Penal Code* §204 was in the same language as the section of the Banking Act involved in the present case, but prior to the Banking Act there had been no statutory definition of insolvency.

In the Griffin case the Supreme Court of Georgia held that insolvency did not mean a mere inability to pay all claims as they matured, since many things might cause such an inability other than fraudulent banking, such as sudden runs on the bank, business depression, and the like. The court held that insolvency as used in this connection was limited to a deficit of assets as against liabilities. On this construction of insolvency the court, in the Griffin case, sustained the constitutionality of the statute, with a strong indication that if insolvency were held to mean merely an inability to pay all depositors on demand the presumption of fraud would be unreasonable in the extreme. The inference is that on such construction the presumption would be unconstitutional.

We quote from the Griffin case as follows:

> "The penal statutes are supposed to prevent fraudulent banking. They are not intended to force all banks to keep all deposits in the vault ready for the depositor upon call. Statutes regulating banking expressly permit the loaning of deposits by requiring the bank to keep on hand a reserve of only 15 to 20 per cent. of their deposits. Does the legislature permit banks to loan 80 to 90 per cent. of deposits, and at the same time fix a heavy penalty for not always having the same money on hand to pay out on demand?"

While this language is quoted by the Supreme Court of

Georgia from another court it is obviously quoted with approval.

In this situation the legislature adopted the Banking Act of 1919, carried into it *Penal Code* §204 *as* §28 *of Art.* 20, this being the statute on which the present indictment was found, and proceeded at the same time to enact a definition of insolvency which makes the insolvency referred to by the statute mean exactly what the Supreme Court of Georgia had held that it did not theretofore mean, and had suggested that it could not mean without being highly unreasonable.

The dissent of two Justices of the Supreme Court of Georgia in the present case is largely predicated upon the ground that this new definition of insolvency makes the presumption so unreasonable as to deny due process of law.

Under this definition of insolvency, any time a bank is unable to pay all of its depositors who demand their money, even though it has abundant assets to liquidate all claims in time, it is insolvent and the president and each director is presumed to be guilty of fraudulent banking.

As the dissenting justices in this case point out, the only way that the bank can always be ready to meet all of its deposits on demand is to keep all of its deposits in cash in its bank vault, whereas the same *Banking Act, in* §29 *of Art.* 19, provides that a bank need keep only fifteen per cent. of its demand deposits as a cash reserve, and if a member of the Federal Reserve System may keep even less. If a bank, in compliance with this statutory permission, lends out eighty-five per cent. of its demand deposits and then more than fifteen per cent. of its depositors suddenly demand their money, the bank is insolvent under the Georgia Banking Act, and a presumption of guilt arises against its president and directors. This presumption has been

raised merely because the bank did exactly what the law authorized it to do, namely, loaned out a large part of its demand deposits, which is, of course, the only way in which a bank can make a profit. We quote from the dissenting opinion in this case: "Fraud cannot be presumed from acts which the law expressly authorizes."

In addition to the fact that this statute authorizes a presumption of fraud where the law has been strictly complied with, we ask the consideration of the inherent unreasonableness and arbitrary character of this presumption.

Consider the things other than fraud which may cause the insolvency of a bank, especially insolvency as defined by the Georgia law. Sudden runs, business depression in the community, bad judgment in making loans, a general deflation in values, the failure of several large customers, an almost unlimited number of economic causes, some of which may involve bad judgment on the part of the bank officials, but all of which are entirely separate from any suspicion of fraud, are the cause of numberless bank failures.

It must be clear as a matter of general observation that the overwhelming majority of bank failures is due to economic causes of the kind indicated, or to fraud and breach of trust by subordinate officers and employees, and that only a relatively small minority of such failures is attributable to the fraud of the president or of the members of the board of directors. Certainly it is a matter of common knowledge that a very large part of the failures are not due to the fraud of those officials named in the Georgia statute. It is unreasonable to attribute all bank failures presumptively to a cause which does not produce a relatively large part of them. To do so is inherently harsh and arbitrary.

But the present statute goes further than this. It does

not simply presume that some officer has been guilty of fraud. It presumes that the *particular officer* who is placed on trial is the one whose fraud has produced the failure. In doing so the statute passes all possible bounds of reason. For example, to take some particular director and from the mere failure of the bank to presume that that particular director had been guilty of frauds which produced the insolvency, would be ridiculous were it not for the fact that it is tragic, both from the standpoint of the accused and as an illustration of what legislative bodies occasionally do.

It is no answer whatever to say that if the particular director is not guilty he is permitted to exculpate himself and to show that the failure was caused by a sudden run, or by a business depression, or by something of a similar character. To say this merely means that the presumption is prima facie and not conclusive; but so was the presumption which this court invalidated in the Bailey case, and the presumption invalidated by this court in the McFarland case. These two decisions settle forever the proposition that a legislature cannot raise an unreasonable and arbitrary presumption against an accused and then sustain the presumption merely because it is prima facie and not conclusive.

In *Bailey* v. *Alabama*, *supra*, this court discusses the position of an accused who had obtained money on a promise to work, who had then broken his contract, and against whom the presumption of guilt had been raised by the statute. The court says:

> "He stood, stripped by the statute of the presumption of innocence, and exposed to conviction for fraud upon the evidence only of breach of contract and failure to pay."

Under the statute now before the court, upon the mere failure of a bank to pay in due course its president and

each of its directors, if indicted, stands in exactly such position and with less reason for the presumption so drawn, since there are more causes other than fraud of the particular officer on trial which might cause a bank to be unable to meet all of its deposits on demand than there are causes other than fraud which might cause a laborer, after receiving an advance from his employer, to break his contract of employment.

When it comes to meeting the presumption thus created a bank president or director is in a worse position than that of the laborer dealt with in *Bailey* v. *Alabama*. In the first place the presumption takes in vastly more territory. The laborer is required to defend only one transaction. The scope of this presumption and the extent to which the defendant must go to meet it and to be prepared for possible attacks upon him has already been pointed out in the preceding section of this brief.

The presumption cannot be sustained upon the theory that the proof to rebut it is peculiarly within the control of the defendant. Where the proof to rebut a presumption is in fact especially under the control of the defendant this is a factor which may be considered in connection with the reasonableness of the presumption; but so far as we know no case has ever sustained a presumption held to be unreasonable and arbitrary merely upon the ground that proper proof is likely to be in the defendant's possession. In the particular case, however, it is not true that the proof on this subject would normally be in the defendant's possession. On the contrary, the proof on the subject would invariably be in the custody and control of state officials. Where is the proof as to the management of a bank, the conduct of its affairs, and the cause of its insolvency usually found? Primarily in its books and records. Not exclusively there of course. Other proof may be taken to supplement what is written in its records and to explain and contradict them, but all such proof is

merely supplementary. The accounting system of a bank and its papers and records are the sources from which the most vital information must be obtained from which the presumption raised by the statute is to be rebutted, if at all. How else could an officer show that the affairs of the bank had been managed fairly, legally and with ordinary care? Indeed, how could he show what the affairs were at all except in such minor number of isolated transactions as he might retain in his unaided memory?

Now, immediately on the insolvency of a bank all of these vital records pass from the control of its officers. *Art. 7 of the Banking Act* (*Ga. L.* 1919, *pp.* 154 *through* 164) requires the Superintendent of Banks of the State of Georgia to take immediate possession of a bank upon its insolvency and to take custody of all of its books, papers and records. Therefore a defendant, against whom this presumption is raised, instead of finding himself in possession of the necessary proof to rebut it, finds that this proof is under the control of the officers of the state by whom he is being prosecuted. There is, of course, legal machinery by which he can force the production of such records at the trial; but the point is that the presumption against him cannot be justified upon the ground that proof to rebut it is in his possession, since in point of fact the state has taken the proof away from him, and the proof with regard to various transactions which the bank was conducting is primarily in the control of his adversaries.

Furthermore, under Georgia law, the defendant is disqualified as a witness, although allowed to make a statement, which the jury may regard or disregard as they see fit, but which is not evidence in the case. It is true that this court held in *Hawes* v. *State of Georgia*, 258 *U. S.* 1, that this in itself is not sufficient to prevent the state from raising a presumption against the accused. But that such a statutory disqualification of the defendant as a witness is a factor which must be given some consideration in con-

nection with the reasonableness of a presumption, was also pointed out by this court in *Bailey* v. *Alabama*.

In the light of all of these considerations it is respectfully submitted that the presumption now before the court is more unreasonable, arbitrary, harsh, and oppressive than any statutory presumption which has heretofore been brought to the consideration of this court.

In Conclusion.

The full nature of this statute cannot be grasped merely from a separate consideration of each of the three points which we have made. Their combined operation produces a result greater than the mere sum of the three. The statute as a whole merely furnishes to a community excited over the failure of a bank a convenient and workable method of sending the president and directors to the penitentiary. Due process means at least that mob law shall not be invited into the court house to masquerade under the guise of legal procedure.

Respectfully submitted,

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